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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

EVAN MINTON,

Plaintiff,

vs.

DIGNITY HEALTH; DIGNITY HEALTH
d/b/a MERCY SAN JUAN MEDICAL
CENTER,

Defendants.

Case No. CGC 17-558259

DEFENDANT DIGNITY HEALTH'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRERS TO VERIFIED COMPLAINT

[Filed concurrently with: (1) Notice of
Demurrers; (2) Demurrers; (3) Request for
Judicial Notice; (4) Declaration of Craig S.
Rutenberg; (5) Notice of Payment for Court
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1 **I. INTRODUCTION**

2 Plaintiff Evan Minton, a transgender man who sought a hysterectomy from Mercy San
3 Juan Medical Center (“Mercy”), a Dignity Health hospital, has failed to allege a cause of action
4 for intentional discrimination under the Unruh Act. Minton alleges that Dignity Health cancelled
5 the planned hysterectomy at Mercy, a Catholic hospital, because Mercy does not perform
6 hysterectomies to treat gender dysphoria and that Dignity Health promptly rescheduled the
7 procedure to take place at Methodist Hospital, a non-Catholic hospital also owned by Dignity
8 Health. The surgery was performed there three days later. Minton’s Complaint admits that even
9 this modest delay was due to his physician’s schedule rather than the actions of Dignity Health.
10 As a matter of law, these allegations do not state a claim for intentional discrimination under the
11 Unruh Act.

12 First, the Unruh Act does not prohibit the alleged discrimination based upon the diagnosis
13 of gender dysphoria. Minton alleges gender dysphoria is a medical condition suffered by some
14 transgender individuals involving mental distress related to gender non-conformity. Although
15 Minton labels the claim as one for “sex” discrimination, the complaint in fact states that Mercy
16 determines whether or not to permit a hysterectomy based upon whether the procedure is intended
17 to treat gender dysphoria or another condition, such as cancer. While the Unruh Act prohibits
18 disrimination based upon certain narrowly defined medical conditions, gender dysphoria is not
19 among those conditions. Therefore, Minton has failed to state a claim under the Unruh Act.

20 Second, the Unruh Act forbids only intentional discrimination and does not prohibit
21 disparate impact discrimination. The complaint fails to allege any discriminatory animus against
22 persons with gender dysphoria or transgender individuals. To the contrary, the complaint alleges
23 that at Mercy, a Catholic hospital, Dignity Health not surprisingly distinguishes between
24 hysterectomies performed as a treatment for gender dysphoria and hysterectomies performed to
25 treat other conditions. Minton further alleges that this purported policy burdens transgender
26 people because they have a higher incidence of gender dysphoria and a significant percentage of
27 transgender men have had, or would like to have, a hysterectomy. These allegations do not state
28 a cause of action for intentional discrimination. To the extent Minton alleges a disparate impact,

1 the claim is not actionable under the Unruh Act which does not prohibit disparate impact
2 discrimination. *Turner v. Ass'n of Am. Med. Colls.*, 167 Cal.App.4th 1401, 1408 (2008) (“A
3 policy that is neutral on its face is *not actionable* under the Unruh Act, even when it has a
4 disproportionate impact on a protected class”) (emphasis added).

5 Not only does the complaint fail to allege intentional discrimination, Minton’s allegations
6 affirmatively establish that there was no such discrimination. The complaint affirmatively alleges
7 that Dignity Health accommodated Minton by immediately rescheduling the procedure at “a non-
8 Catholic Dignity Health hospital” in Sacramento. (Compl. ¶ 24). Alone, this fact establishes that
9 Dignity Health, the only defendant, did not discriminate against Minton. Instead, Dignity Health
10 simply followed binding Catholic doctrine, which prohibited Mercy from performing the
11 hysterectomy and did its best to accommodate Minton nonetheless.

12 Third, Dignity Health did exactly what the California Supreme Court told health care
13 providers to do when confronted with a conflict between its religious tenets and a patient’s
14 request for a medical procedure. In *North Coast Women’s Care Med. Grp. v. Sup. Court*, 44
15 Cal.4th 1145 (2008), the Supreme Court held that where certain physicians had religious
16 objections to providing fertility treatment to lesbians, their medical practice could avoid liability
17 under the Unruh Act by “ensur[ing] that every patient [receive the procedure] through a North
18 Coast physician lacking defendants’ religious objections.” *Id.* at 1159. Here, the complaint
19 admits that Dignity Health did just that – it rescheduled the procedure to be performed a few days
20 later at a “non-Catholic Dignity Health hospital”, and thus was able to provide Minton with the
21 procedure he sought while not violating Mercy’s religious beliefs. (Compl. ¶ 24.)

22 Fourth, Minton ignores decades of jurisprudence confirming that a Catholic hospital may
23 prohibit procedures that violate the hospital’s faith.¹ Minton overlooks Dignity Health’s

24
25 ¹ *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75, 77 (9th Cir. 1975) (“If the hospital’s refusal to perform
26 sterilization infringes upon any constitutionally cognizable right to privacy, such infringement is
27 outweighed by the need to protect the freedom of religion of denominational hospitals ‘with religious or
28 moral scruples against sterilizations and abortions’) (citation omitted); *Watkins v. Mercy Med. Ctr.*, 364 F.
Supp. 799, 803 (D. Idaho 1973) (“Mercy Medical Center has the right to adhere to its own religious beliefs,
and not be forced to make its facilities available for services which it finds repugnant to those beliefs”) *aff’d*, 520 F.2d 894 (9th Cir. 1975); *Allen v. Sisters of St. Joseph*, 361 F. Supp. 1212, 1214 (N.D. Tex. 1973)
 (“The interest that the public has in the establishment and operation of hospitals by religious organizations
is paramount to any inconvenience that would result to the plaintiff in requiring her to either be moved or
await a later date for her sterilization”), *aff’d*, 490 F.2d 81 (5th Cir. 1974).

1 constitutional rights of free exercise of religion and freedom of expression. Cal. Const., art. I, §§
2 2 and 4; U.S. Const., 1st Am. State laws that burden these freedoms are subject to strict scrutiny.
3 *Catholic Charities of Sacramento v. Sup. Ct.*, 32 Cal.4th 527, 562 (2004); *North Coast*, 44
4 Cal.4th at 1158-59. Under strict scrutiny, no law (or court order) can be applied “in a manner that
5 substantially burden[s] a religious belief or practice unless the state show[s] that the law
6 represent[s] the least restrictive means of achieving a compelling interest or, in other words, [is]
7 narrowly tailored.” *Catholic Charities*, 32 Cal.4th at 562. That Mercy was able to reschedule the
8 procedure at an affiliated “non-Catholic Dignity Health hospital” within 72 hours unequivocally
9 shows that a less restrictive means was available.

10 The Court should sustain the demurrer without leave to amend.²

11 **II. FACTS**

12 **A. Minton’s Allegations**

13 Minton is a transgender man; he was born with female anatomy but identifies as a man.
14 (Compl. ¶ 9.) Minton first began to identify as male in 2011 and, at some point after 2011,
15 Minton was diagnosed with gender dysphoria. (*Id.* ¶ 17.) Minton began hormone replacement
16 therapy in 2012, and had a bilateral mastectomy in 2014. (*Id.*, ¶ 17.) He legally changed his
17 name and gender on his driver’s license. (*Id.*)

18 By August 2016, Minton had a plan for a series of medical procedures to further
19 implement his gender transition, beginning first with a complete hysterectomy (removal of his
20 uterus, fallopian tubes, and ovaries), followed by phalloplasty, the surgical creation of a penis.
21 (*Id.*, ¶ 18.) Minton originally scheduled his hysterectomy for August 30, 2016, at Mercy. (*Id.*, ¶¶
22 18, 19.) On August 28, 2016, Mercy learned that Minton’s scheduled hysterectomy was to treat
23 gender dysphoria. (*Id.* ¶ 21). The next day, Mercy allegedly notified Minton’s physician that
24 Dignity Health would not permit the procedure to be performed at Mercy because the
25 hysterectomy was scheduled as a treatment for gender dysphoria. (*Id.* ¶ 21). However, Dignity
26

27 ² Minton’s prayer for injunctive relief is also moot. He admits that the hysterectomy he sought was
28 performed on September 2, 2016 making it unnecessary for him to seek additional inpatient hospital
surgical services. (Complaint, ¶ 25.) As Minton does not seek class relief, he had no legal basis to seek
injunctive relief for himself or anyone else.

1 Health immediately rescheduled the procedure to take place at Methodist Hospital, a “non-
2 Catholic Dignity Health hospital.” (*Id.* ¶ 24.) Minton’s physician could not perform the surgery
3 immediately. (*Id.*). As a result, the hysterectomy was performed three days later on September 2,
4 2016, at Methodist Hospital, which is also in Sacramento. (*Id.* ¶ 25).

5 Minton alleges that gender dysphoria is a “medical condition.” (Compl. ¶¶ 12, 32).
6 Gender dysphoria is codified in the Diagnostic and Statistical Manual of Mental Disorders, Fifth
7 Edition (2013) (“DSM-V”) and International Classification of Diseases (“ICD-10”). (Compl.
8 ¶12.) In the DSM-V, the American Psychiatric Association defines “gender dysphoria” as “the
9 distress that may accompany the incongruence between one’s experienced or expressed gender
10 and one’s assigned gender.”³ The ICD-10 classifies gender identity disorder as within the
11 category of adult personality and behavior disorders.⁴ (Compl. ¶ 12.) Treatment may include
12 hormone therapy, surgery, or other medical procedures. (*Id.* ¶ 14.⁵

13 Finally, Minton alleges that Dignity Health “violates California law by prohibiting doctors
14 from performing hysterectomies for patients with gender dysphoria while permitting doctors to
15 perform hysterectomies for patients without gender dysphoria.” (*Id.* ¶ 6; *see id.* 22, 32, 33
16 (same)). According to Minton such conduct constitutes discrimination on the basis of transgender
17 sexual identity because in a 2015 survey “14% of transgender men surveyed had undergone a
18 hysterectomy and 57% wanted a hysterectomy someday.” (*Id.* ¶ 16).

19 **B. Mercy**

20 Mercy is a Catholic hospital owned by Dignity Health. (Compl.¶ 10). It was founded in
21 1967 by the Sisters of Mercy, a Catholic congregation of women religious who carry out the

22 _____
23 ³ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, p. 451 (2013).

⁴ International Statistical Classification of Diseases and Related Health Problems, § F64.8.

24 ⁵ There is no consensus regarding surgical treatment for gender dysphoria. The federal government has
25 conducted its own studies regarding surgical treatment for gender dysphoria and reported “conflicting”
26 results: “some reported benefits while others reported harms.” *Franciscan Alliance, Inc. v. Burwell*, -- F.
27 Supp. 3d --, 2016 WL 7638311, at *20 (N.D. Tex. December 31, 2016) (citing Centers for Medicare &
28 Medicaid Services, Proposed Decision Memo for Gender Dysphoria and Gender Reassignment Surgery,
(June 2, 2016)). In *Franciscan Alliance*, the court issued a nationwide injunction prohibiting enforcement
of a regulation enacted pursuant to the Patient Protection and Affordable Care Act, which prohibited
discrimination on the basis of gender identity. Franciscan, like Mercy, provides all of its standard medical
services to every individual, including those who identify as transgender. *Id.* at *4. Also like Mercy, it does
not perform gender transition-related procedures because they conflict with its religious beliefs. *Id.* at *4.
Franciscan successfully challenged the regulation because it would require Franciscan, and other religious
health care providers, to provide gender transition procedures that conflict with their religious beliefs. *Id.* at
3.

1 healing ministry of Jesus by bringing health care to millions of people through the founding and
2 administration of hospitals. The Sisters of Mercy first arrived in Sacramento in 1857 and began
3 providing healthcare to the community before the turn of the century.⁶ Today the Sisters of
4 Mercy serve in six health systems and many related facilities across the United States.⁷ See
5 *McKeon v. Mercy Healthcare Sacramento*, 19 Cal.4th 321, 323 (1998)(Sisters of Mercy founded
6 Dignity Health's Sacramento hospitals in 1897), superseded by statute as stated in *Silo v. CHW*
7 *Medical Foundation*, 27 Cal.4th 1097, 1110 (2002).

8 Dignity Health's mission is to "further[] the healing ministry of Jesus"⁸ and Mercy is
9 listed in the Official Catholic Directory, which reflects that Mercy is an official part of the
10 Catholic Church. (Request for Judicial Notice ("RJN") Ex. 1.)⁹ As such, Mercy is bound to
11 follow the Ethical and Religious Directives (ERDs), which are promulgated by the U.S.
12 Conference of Catholic Bishops.¹⁰ (RJN, Ex. 2.) *McKeon*, 19 Cal.4th at 323 (Mercy hospital is
13 bound by the ERDs "which require fidelity to the church's teachings, are issued by the National
14 Conference of Bishops" and are incorporated into the articles of incorporation and bylaws of the
15 religiously affiliated entity that owns the hospital). The ERDs' purpose is to "reaffirm the
16 ethical standards of behavior in health care that flow from the Church's teachings about the
17 dignity of the human person" and "to provide authoritative guidance on certain moral issues that
18 face Catholic health care today." *Means v. U.S. Conf. of Catholic Bishops*, 2015 WL 3970046,
19 at *3 (W.D. Mich. 2015), *aff'd*, 836 F.3d 643 (6th Cir. 2016). Directive 5 provides that "Catholic
20 health care services *must adopt these Directives* as a policy, [and] *require adherence to them*
21 *within the institution as a condition for medical privileges and employment . . .*" (RJN Ex. 2
22 (emphasis added).) Catholic hospitals that fail to adhere to the ERDs risk revocation of their

23
24 ⁶ <https://www.dignityhealth.org/sacramento/about-us/our-history>

25 ⁷ <https://www.sistersofmercy.org/what-we-do/healthcare/>

26 ⁸ <https://www.dignityhealth.org/sacramento/about-us/mission-vision-and-values>

27 ⁹ "An entity is listed in the [OCD] only if a bishop of the Roman Catholic Church determines the entity is
28 'operated, supervised, or controlled by or in connection with the Roman Catholic Church.' Courts view the
[OCD] listing as a public declaration by the Roman Catholic Church that an organization is associated with
the Church." *Overall v. Ascension*, 23 F. Supp. 3d 816, 831 (E.D. Mich. 2014) (citation omitted).

¹⁰ "Individual bishops exercise authority under Canon Law to bind all Catholic health care institutions
located within their diocese to the ERDs as particular law within the diocese." *Means v. U.S. Conf. of*
Catholic Bishops, 2015 WL 3970046, at *3 (W.D. Mich. June 30, 2015), *aff'd* 836 F.3d 643.

1 Catholic status altogether.¹¹ Directive 29 provides, “All persons served by Catholic health care
2 have the right and duty to protect and preserve their bodily and functional integrity. The
3 functional integrity of the person may be sacrificed to maintain the health or life of the person
4 when no other morally permissible means is available.”¹²

5 **C. The Unruh Act Claim Fails as a Matter of Law**

6 **1. Minton’s Allegation that Dignity Health Discriminates on the Basis of**
7 **Gender Dysphoria, a Medical Condition, Is Not Actionable Under the**
8 **Unruh Act.**

9 Although Minton labels his claim as one for “sex” discrimination under the Unruh Act,
10 the Complaint alleges discrimination on the basis of an alleged “medical condition.” Specifically,
11 Minton repeatedly alleges that Dignity Health discriminated against him because it allegedly
12 refused to permit his physician to perform a hysterectomy as a treatment for gender dysphoria
13 while permitting physicians to perform hysterectomies for other medical conditions. Compl. ¶ 12
14 (“Gender dysphoria is a serious medical condition . . .”); ¶ 6 (defendant violates Unruh Act “by
15 prohibiting doctors from performing hysterectomies for patients with gender dysphoria while
16 permitting doctors to perform hysterectomies for patients without gender dysphoria”); ¶ 27 (“If
17 Defendant is not enjoined from preventing doctors from performing hysterectomy procedures for
18 patients with gender dysphoria in its hospitals. Mr. Minton and others similarly situated – i.e.,
19 transgender individuals who suffer from gender dysphoria -- will be unlawfully denied access to
20 medical treatment . . .”).

21 The Unruh Act prohibits discrimination on the basis of specific “medical conditions.”
22 However, gender dysphoria is not one of the specific medical conditions identified in the statute.
23 Under the Unruh Act, “medical condition” has the same meaning as defined in subdivision (i) of
24 Section 12926 of the Government Code, which narrowly defines that term to include health
25 impairments related to cancer and genetic characteristic including a scientifically or medically
26 identifiable gene or chromosome “that is known to be the cause of a disease or disorder in a

27 ¹¹ <http://archive.azcentral.com/ic/pdf/1221olmsted-decree.pdf>; <http://abcnews.go.com/Health/abortion-debate-hospital-stripped-catholic-status/story?id=12455295>; see also <https://www.aclu.org/report/report-health-care-denied?redirect=report/health-care-denied> at p. 7 (“[D]eviation [from the ERDs] can sometimes
28 carry penalties – including the loss of the hospital’s ‘Catholic’ status . . .”).

¹² RJN, Ex. 3 (ERD 53 provides, “Direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution.”)

1 person . . .”. Civ. Code § 51(e)(3); Gov. Code §12926(i).¹³ Here, cancer is irrelevant and
2 Minton does not allege that Dignity Health discriminated against him based upon a genetic
3 characteristic known to cause a disease or disorder. Accordingly, as a matter of law, the Unruh
4 Act does not prohibit the alleged discrimination on the basis of gender dysphoria.

5 **2. Minton’s Complaint Also Does Not Allege Intentional Discrimination**
6 **on the Basis of Gender.**

7 In an attempt to avoid pleading a cause of action for discrimination based upon a medical
8 condition that is not actionable under the Unruh Act, Minton labels the same allegations as
9 discrimination on the basis of “sex.” However, this basis of the complaint also fails. To state a
10 claim under the Unruh Act a plaintiff must allege intentional and invidious sex discrimination.
11 Disparate impact discrimination is not actionable. *Harris v. Capital Growth Investors XIV*, 52
12 Cal.3d 1142, 1172 (1991) (landlord’s minimum income policy did not violate Unruh Act
13 notwithstanding disparate impact on women); *Koebke v. Bernardo Heights Country Club*, 36
14 Cal.4th 824, 853 (2005) (club’s policy extending benefits to spouses did not violate the Unruh
15 Act notwithstanding disparate impact on unmarried same sex couples); *Turner*, 167 Cal.App.4th
16 at 1408-09 (time limit for MCAT examination does not violate Unruh Act notwithstanding
17 disparate impact on those with learning or reading-related disabilities); *Greater L.A. Agency on*
18 *Deafness v. Cable News Network, Inc.*, 742 F.3d 414, 427 (9th Cir. 2014) (rejecting argument that
19 CNN violated the Unruh Act by acting with deliberate indifference to the *known* impact on
20 hearing-impaired persons of its practice of not making closed-captioning available for on-line
21 videos); Civ. Code § 51(c) (“This section shall not be construed to confer any right or privilege
22 on a person that is . . . applicable alike to persons of every sex . . .”).

23 Here, the alleged conduct and policy – Dignity Health’s refusal to permit hysterectomies
24 for people diagnosed with gender dysphoria while permitting hysterectomies for people with

25 ¹³ Government Code 12926 (i) provides: “Medical condition” means either of the following: (1) Any health
26 impairment related to or associated with a diagnosis of cancer or a record or history of cancer. (2) Genetic
27 characteristics. For purposes of this section, “genetic characteristics” means either of the following: (A) Any
28 scientifically or medically identifiable gene or chromosome, or combination or alteration thereof, that is
known to be a cause of a disease or disorder in a person or his or her offspring, or that is determined to be
associated with a statistically increased risk of development of a disease or disorder, and that is presently
not associated with any symptoms of any disease or disorder. (B) Inherited characteristics that may derive
from the individual or family member, that are known to be a cause of a disease or disorder in a person or
his or her offspring, or that are determined to be associated with a statistically increased risk of development
of a disease or disorder, and that are presently not associated with any symptoms of any disease or disorder.

1 other medical conditions – does not intentionally discriminate against transgender people.
2 According to the complaint, this policy impacts transgender people because a significant
3 percentage of transgender men with gender dysphoria allegedly also have had, or want, a
4 hysterectomy. For this reason Minton alleges that statistical evidence gathered from a 2015
5 survey establishes that a significant number of transgender men have had or say they would
6 someday like to have a hysterectomy. However, that a hospital’s alleged policy of refusing to
7 provide a hysterectomy as a treatment for gender dysphoria may impact a protected group such as
8 transgender men does not support a claim for intentional discrimination.

9 Minton’s allegations actually establish the absence of intentional discrimination. Dignity
10 Health permitted the procedure at one of its hospitals, thereby unequivocally demonstrating that it
11 does not intentionally discriminate against transgender people or prohibit physicians from
12 performing hysterectomies to treat gender dysphoria. Instead, Dignity Health simply exercised a
13 reasonable administrative prerogative¹⁴ to reschedule Minton’s surgery at a hospital that was not
14 barred from performing the procedure due to its required adherence to Catholic doctrine.¹⁵

15 Moreover, Mercy’s adherence to the ERDs is the very antithesis of discrimination.
16 Mercy, as a Catholic hospital, treats all of its ministry’s patients with respect and
17 compassion. The Church articulated this requirement at the Second Vatican Council in 1965,
18 stating: “with respect to the fundamental rights of the person, *every type of discrimination*,
19 whether social or cultural, whether based on sex, race, color, social condition, language or
20

21 ¹⁴ See *Mateo-Woodburn v. Fresno Community Hospital and Medical Center*, 221 Cal.App.3d 1169, 1184
22 (1990) (“An important public interest exists in preserving a hospital’s ability to make managerial and policy
23 determinations and to retain control over the general management of the hospital’s business.”); see also *See*,
24 e.g., *Lewin v. St. Joseph’s Hospital of Orange*, 82 Cal.App.3d 368, 384-85 (1978) (“The operation and
25 administration of a hospital involves a great deal of technical and specialized knowledge and experience,
26 and the governing board of a hospital must be presumed to have at least as great an expertise in matters
27 relating to operation and administration of the hospital as any governmental administrative agency with
28 respect to matters committed to its authority. . . . Judges are untrained and courts ill-equipped for hospital
administration, and it is neither possible nor desirable for the courts to act as supervening boards of directors
for every nonprofit hospital corporation in the state. . .”).

¹⁵ Minton also does not allege that Mercy refuses all treatment for patients with gender dysphoria, which
negates the core contention that Mercy discriminates based upon gender identity. A defendant does not
discriminate against a protected group when it provides services to others in the same group. Rather,
Minton argues that because Mercy allows some hysterectomies (in cases of diseased organs), it is required
to allow a hysterectomy involving healthy organs for a transgender man. But Minton has not alleged that
Mercy would perform a hysterectomy on a healthy organ for anyone, whether a transgendered man or a
cisgendered woman; regardless of the patient’s gender identity, the procedure is not performed because it
violates the core principle of bodily integrity contained in Directive 29. This is yet another reason that
Minton has failed to allege intentional discrimination based upon sex.

1 religion, is to be overcome and eradicated as contrary to God's intent."¹⁶ And ERD 23 provides
2 that "[t]he inherent dignity of the human person must be respected and protected regardless of the
3 nature of the person's health problem or social status. The respect for human dignity extends to
4 *all persons who are served by Catholic health care.*" (RJN Ex. 3 (emphasis added).) The reason
5 for denying Minton's requested procedure had nothing to do with discrimination based upon sex;
6 the procedure was denied because Mercy is a Catholic hospital. Indeed, Minton does not allege
7 that Mercy ever refused, or would refuse, to provide him with inpatient hospital services for any
8 other condition besides a hysterectomy for gender dysphoria. That alone dispels the notion that
9 Mercy intentionally discriminated against Minton because of his "gender,"

10 **3. Dignity Health Followed the Rule Stated in the California Supreme**
11 **Court's Decision in *North Coast*.**

12 The Unruh Act claim also fails because Dignity Health did exactly what the California
13 Supreme Court said to do to in similar circumstances in order to avoid Unruh Act liability. In
14 *North Coast*, the Court held that where physicians objected on religious grounds to providing
15 fertility treatment to a lesbian couple, the physician practice could avoid liability under the Unruh
16 Act by "ensur[ing] that every patient [receive the procedure] through a North Coast physician
17 lacking defendants' religious objections." *North Coast*, 44 Cal.4th at 1159.¹⁷ That is exactly
18 what Minton admits Dignity Health did; it did not allow the procedure at Mercy due to Catholic
19 doctrine, but it promptly arranged for the procedure to be performed at another, "non-Catholic
Dignity Health hospital" just three days later. (Compl. ¶ 24.)¹⁸

20 **D. The State and Federal Constitutions Bar Minton's Claim**

21 **1. A Court May Not Compel a Religious Hospital to Violate Religious**
22 **Doctrine**

23 A private Catholic hospital may not be compelled to perform a procedure that it believes
24 is prohibited by religious doctrine that is binding on the hospital.¹⁹ As a result, Minton's claim is

25 ¹⁶ http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html (Vatican Council II, Pastoral Constitution of the Church in the
26 Modern World, n. 29 (emphasis added)).

27 ¹⁷ The Court also held that the practice could avoid liability by refusing "to perform the IUI medical
procedure . . . for any patient of North Coast." *Id.*

28 ¹⁸ The complaint neglects to allege whether Minton's physician, Dr. Dawson, had admitting privileges at
other secular hospitals in Sacramento that would have allowed her to perform Minton's hysterectomy.
Minton certainly does not allege that Dr. Dawson practiced exclusively at Mercy.

¹⁹ The ACLU has conceded that it is inappropriate to require the provision of certain procedures where

1 barred because he seeks to interfere with Mercy's constitutional rights to free exercise of religion
2 and expression.

3 Minton's lawsuit ignores the courts' uniform recognition that private religious hospitals
4 and physicians may not be forced to provide procedures contrary to their religious principles. *See*
5 *Allen*, 361 F. Supp. at 1213-14 (plaintiff's desire for postpartum contraceptive tubal ligation did
6 not create emergency or overriding interest justifying court intervention in the Catholic hospital's
7 policies); *Conservatorship of Morrison*, 206 Cal.App.3d 304, 311 (1988) ("[N]o physician should
8 be forced to act against his or her personal moral beliefs if the patient can be transferred to the
9 care of another physician who will follow the [patient's] direction"); *Chrisman*, 506 F.2d at 312
10 ("There is no constitutional objection to the decision by a purely private hospital that it will not
11 permit its facilities to be used for the performance of abortions") (citation omitted).

12 For more than forty years, Courts have recognized the paramount conscience rights of
13 religious hospitals. Although the older cases do not address transgender surgery, that is a
14 distinction without a difference. For the Catholic Church, transgender surgery, abortion, and
15 contraceptive sterilization raise the same ethical and doctrinal concerns. Minton's claim fails in
16 the face of this uniform case law.

17 **2. The Relief Sought Would Violate Constitutionally Protected Free** 18 **Exercise and Free Expression Rights.**

19 The right to free exercise of religion is enshrined in the state and federal constitutions.
20 Cal. Const., art. I, § 4 ; U.S. Const., 1st Am.; *People v. Woody*, 61 Cal.2d 716, 718, n.1, 727
21 (1964) (religious freedom is "guaranteed" under the California Constitution, and "the right to free
22 religious expression embodies a precious heritage of our history"). The right to freedom of

23 doing so would "compel devout Catholics to engage in behavior . . . in violation of their Faith." *See* ACLU
24 Amicus Brief in *Benitez v. North Coast Women's Care Medical Group*, Cal. S.Ct. No. S142892 (Apr. 2,
25 2007), p. 2; ACLU Amicus Brief in *Catholic Charities of Sacramento v. Sup. Ct.*, Cal. S.Ct. No. S009982
26 (Jan. 18, 2001) p. 37. [https://www.aclu.org/legal-document/aclu-amicus-brief-catholic-charities-sacramento-](https://www.aclu.org/legal-document/aclu-amicus-brief-catholic-charities-sacramento-v-superior-court-sacramento-county)
27 [v-superior-court-sacramento-county](https://www.aclu.org/legal-document/aclu-amicus-brief-catholic-charities-sacramento-v-superior-court-sacramento-county). Similarly, in arguing for the Religious Freedom Restoration Act
28 ("RFRA"), 42 U.S.C. § 2000bb, the ACLU stated that "RFRA was plainly intended to protect religious
organizations like Petitioners here from being forced to participate in the provision of healthcare benefits
that conflict with their religious beliefs." Nadine Strossen, then president of the ACLU, testified in support
of RFRA, noting that the statute safeguarded "such familiar practices" as "*permitting religiously sponsored*
hospitals to decline to provide abortion or contraception services." The Religious Freedom Restoration
Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary, 102d Cong. 192 (1992) (Prepared Statement
of Nadine Strossen, pp. 80-81 (emphasis added)),
<https://www.justice.gov/sites/default/files/jmd/legacy/2014/07/13/hear-99-1992.pdf>.

1 expression is also constitutionally protected. Cal. Const., art. I, § 2; U.S. Const., 1st Am. As a
2 result, the California Supreme Court applies strict scrutiny to state laws that burden a defendant's
3 religious beliefs under the California Constitution.²⁰ *Catholic Charities of Sacramento v. Sup.*
4 *Ct.*, 32 Cal.4th 527, 562 (2004); *North Coast Women's Care Med. Grp. v. Sup. Court*, 44 Cal.4th
5 1145, 1158-59 (2008); *Smith v. FEHC*, 12 Cal.4th 1143, 1178 (1996). Under strict scrutiny, no
6 law (or court order) can be applied "in a manner that substantially burden[s] a religious belief or
7 practice unless the state show[s] that the law represent[s] the least restrictive means of achieving a
8 compelling interest or, in other words, [is] narrowly tailored." *Catholic Charities*, 32 Cal.4th at
9 562. Minton, who received the procedure within three days at another Dignity Health hospital,
10 clearly cannot make that showing.

11 Here, Minton seeks to force Mercy to violate the ERDs by permitting a procedure that
12 Mercy concluded was not permitted under Catholic doctrine and that would be contrary to its
13 religious mission of treating each patient with love, respect, and dignity. Under Catholic
14 doctrine, this does not include surgical sterilization through the removal of a patient's healthy
15 organs. Mercy could not comply with such an order without forsaking its Catholic identity—the
16 ultimate burden in a religious freedom case – and conveying the symbolic message that gender
17 transition surgery is consistent with the healing ministry of Jesus. *See id.* at 558-59
18 (constitutional right to free speech protects against compelled symbolic messaging). Moreover,
19 any such order could lead to enforcement of the ERDs by the local Catholic Bishop, who could
20 formally withdraw Mercy's Catholic status and sanction the women religious who administer the
21 hospital. As a result, any such order would be a massive burden on Mercy's constitutional rights
22 of expression, as the hospital itself is an expression of Catholic belief and message symbolizing
23 the healing ministry of Jesus to which it is always been dedicated. *See Texas v. Johnson*, 491

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25 ²⁰ *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990), is not to
26 the contrary. There, the Supreme Court suggested that strict scrutiny applies only to "hybrid" claims
27 involving both the Free Exercise Clause and another federal constitutional right. As discussed herein, the
28 relief Minton requests interferes with Mercy's constitutional right of free expression as well as its free
exercise rights. At any rate, *Smith* is limited in application to "individuals," not to the Catholic church.
Smith, 494 U.S. at 878-79; *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 462 (D.C. Cir. 1996) ("It does not
follow . . . that *Smith* stands for the proposition that a church may never be relieved from [] an obligation [to
comply with a neutral law of general applicability]") (emphasis in original). Finally, Mercy's risk of losing
its Catholic identity is far more than a mere "incidental" burden.

1 U.S. 397, 404 (1989) (symbolic speech is protected by the First Amendment where “[a]n intent to
2 convey a particularized message was present, and [] the likelihood was great that the message
3 would be understood by those who viewed it.”); *Kelly v. Methodist Hosp.*, 22 Cal.4th 1108, 1122
4 (2000) (“Health care is a social service that historically has been associated with religious groups,
5 and plaintiff does not dispute that Hospital’s founders were motivated by a sincerely held belief
6 that healing the sick serves to advance the religious principles of the Methodist faith.”); *cf. First*
7 *Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 182 (Wash. 1992) (en banc) (a
8 church building itself is “‘freighted with religious meaning’” and protected by the First
9 Amendment’s protections of free speech).

10 The Supreme Court has held that public accommodation laws cannot be applied where
11 they violate constitutional rights. In *Boy Scouts of Amer. v. Dale*, 530 U.S. 640 (2000), the
12 Supreme Court held that applying New Jersey’s public accommodations law (similar to the Unruh
13 Act) to require the Boy Scouts to admit a gay scoutmaster violated the Boy Scouts’ First
14 Amendment right of expressive conduct. *Id.* at 640. The Court held that forcing the Boy Scouts
15 to accept the scoutmaster would “force the organization to send a message” contrary to its
16 expressed views against promoting homosexuality thereby impermissibly burdening the Boy
17 Scouts’ expressive rights.²¹ *Id.* at 653; *see also Hurley v. Irish-American Gay, Lesbian and*
18 *Bisexual Group of Boston*, 515 U.S. 557 (1995) (Massachusetts’ public accommodations law
19 could not be applied to force parade organizers to admit openly gay parade unit because it posed
20 an impermissible burden on constitutional rights). California courts have reached the same
21 conclusion. In *Hart v. Cult Awareness Network*, 13 Cal.App.4th 777 (1993), the plaintiff
22 Scientologist sued when he was refused membership in defendant Cult Awareness Network
23 (“CAN”), a nonprofit that educates the public about the harmful effects of mind control practiced
24 by cults. *Id.* at 781-82. The court found that applying the Unruh Act to compel CAN to accept
25 the plaintiff as a member would “place a heavy burden on both types of [CAN]’s constitutionally
26 protected freedom of association under the federal and California Constitutions.” *Id.* at 790. The

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28 ²¹ The content of the protected view is not relevant: “[T]he fact that an idea may be embraced and
advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of
those who wish to voice a different view.” *Id.* at 660.

1 court found no compelling state interest to justify the application of the Unruh Act, noting that
2 “compelling [CAN] to accept Scientologists as members would be tantamount to governmental
3 sponsorship or promotion of one group’s religious beliefs at another group’s expense,” which is
4 prohibited under the Establishment Clause. *Id.* at 791. Moreover, the Court found that “because
5 the state is prohibited from any official involvement that promotes religion, or prefers one
6 religion over another, the Unruh Civil Rights Act could not be applied under the circumstances of
7 this case without violating the religion clauses of the California Constitution.” *Id.* at 792. Here,
8 compelling Mercy to perform a transgender surgery would force a Catholic hospital to send a
9 message contrary to Catholic doctrine and thus would interfere with its constitutional right of free
10 expression.

11 Likewise, the relief requested by Minton is an order compelling symbolic speech. “[T]he
12 First Amendment, subject only to narrow and well-understood exceptions, does not countenance
13 governmental control over the content of messages expressed by private individuals. [Citations
14 omitted.] Our precedents thus apply the most exacting scrutiny to regulations that suppress,
15 disadvantage, or impose differential burdens upon speech because of its content. [Citations
16 omitted.] Laws that compel speakers to utter or distribute speech bearing a particular message are
17 subject to the same rigorous scrutiny. [Citations omitted.] *Turner Broad. Sys., Inc. v. F.C.C.*,
18 512 U.S. 622, 641–42 (1994); *Riley v. National Federation for the Blind of N.C., Inc.*, 487 U.S.
19 781, 798 (1988) (Laws that compel speakers to utter or distribute speech bearing a particular
20 message are subject to the same rigorous scrutiny). Minton cannot demonstrate any compelling
21 state interest sufficient to override Mercy’s constitutional religious freedom. Even if his Unruh
22 Act claim did not fail on its own terms, the minimal impact on the state’s interest from the short
23 delay in the procedure is far outweighed by Mercy’s constitutional rights. *See Woody*, 61 Cal.2d
24 at 718 n.1, 727 (religious freedom is “guaranteed” by the constitution, such that “[t]he scale tips
25 in favor of the constitutional protection”).

26 **3. The Relief Minton Seeks Would Impermissibly Involve the Court in**
27 **Church Affairs and Matters of Church Governance.**

28 The relief sought would also excessively entangle the Court in Catholic religious doctrine

1 and impermissibly intrude on matters of church governance. *Means*, 2015 WL 3970046, at *12.
2 In *Means*, the plaintiff claimed that the sponsors of a Catholic healthcare system acted negligently
3 by adopting the ERDs as hospital policy. *Id.* at *3. Noting that the “application of the [ERDs]” is
4 “inextricably intertwined with the Catholic Church’s religious tenets,” the court dismissed the
5 action because the court would be required to interpret the ERDs to determine whether their
6 application constituted negligence. *Id.* at *13. Though Minton artfully pleads his claim to avoid
7 mention of Mercy’s Catholic identity and the ERDs, he effectively alleges that Mercy
8 discriminated by adhering to the ERDs. As in *Means*, to rule on such claims, the Court would be
9 required to interpret and scrutinize the ERDs, for example, by determining whether decisions to
10 allow or disallow a procedure to remove a healthy organ is not permitted by the ERDs.

11 In addition, the order sought by Minton would directly interfere with the highly structured
12 church governance structure, including the ERDs, which are enforced on Mercy by the Bishop of
13 Sacramento. *New v. Kroeger*, 167 Cal.App.4th 800, 815 (2008) (“Civil courts cannot interfere in
14 disputes relating to religious doctrine, practice, faith, ecclesiastical rule, discipline, custom, law,
15 or polity”); *Nally v. Grace Comm. Church*, 47 Cal.3d 278, 299 (1988) (refusing to impose a duty
16 of care on pastors). Religious organizations are guaranteed “an independence from secular
17 control or manipulation, in short, power to decide for themselves, free from state interference,
18 matters of church government as well as those of faith and doctrine.” *Kedroff v. Saint Nicholas*
19 *Cathedral*, 344 U.S. 94, 116 (1952); *Catholic Univ.*, 83 F.3d at 463 (“the Free Exercise Clause
20 guarantees a church’s freedom to decide how it will govern itself, what it will teach, and to whom
21 it will entrust its ministerial responsibilities . . .”).

22 It is not permissible for the Court to impose upon a hospital that is part of the Catholic
23 church the obligation to allow its facilities to be used for procedures that are contrary to Catholic
24 religious beliefs thereby interfering with the Church’s ability “to shape its own faith and
25 ministry” through administrative restrictions on the types of procedures that may be performed
26 with its facilities. See e.g., *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*,
27 565 U.S. 171, 188-89 (2012); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, -- S. Ct. --,
28 2017 WL 2722410, at *7, n. 2 (U.S. S. Ct. June 26, 2017) (citing *Hosanna-Tabor* and noting that

1 a valid and neutral law of general applicability is not necessarily constitution under the Free
2 Exercise Clause of the U.S. Constitution where it interferes with “an internal church decision that
3 affects the faith and mission of the church itself”). Here, any order compelling Merey, an official
4 part of the Catholic Church, to perform a sterilization procedure through the removal of healthy
5 organ that is not permitted under the ERDs, the rules laid down by the United States Conference
6 of Catholic Bishops and to which all Catholic hospitals must subscribe would obviously interfere
7 with internal decisions of the Church that affect its faith and mission. Therefore, such an order
8 must satisfy strict scrutiny which is not possible, particularly whereas here Dignity Health was
9 able to immediately arrange for the surgery to be performed at a non-Catholic hospital.

10 “The Establishment Clause thus stands as an expression of principle on the part of the
11 Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its
12 ‘unhallowed perversion’ by a civil magistrate.” *Engel v. Vitale*, 370 U.S. 421, 431–32 (1962).
13 Because “the state is prohibited from any official involvement that promotes religion, or that
14 prefers one religion over another,” the Unruh Act cannot be applied here without violating
15 constitutional religion clauses. *See Hart*, 13 Cal.App.4th^{at} 792 (citation omitted). “Improper
16 government involvement with religion ‘tends to destroy government and to degrade religion,’
17 encourage persecution of religious minorities and nonbelievers, and foster hostility and division
18 in our pluralistic society.” *Intern’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 604 (4th
19 Cir. 2017) (citing *Engel*), *cert. granted*, No. 16-1436 (June 26, 2017). A court order compelling a
20 Catholic hospital to perform procedures to which it is morally and ethically opposed is a violation
21 of the Establishment Clause’s protection from unwarranted government intrusion.

22 **III. CONCLUSION**

23 Minton’s claim fails as a matter of law for multiple reasons and is incurably defective.
24 The Court should sustain Dignity Health’s demurrer without leave to amend.

25 Dated: July 3, 2017

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26
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